

UPPER TRIBUNAL (LANDS CHAMBER)



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UTLC Case Numbers: LC-2021-450**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – order made under paragraph 20C of the Landlord and Tenant Act 1985 without giving the landlord the opportunity to make representations – procedural unfairness - appeal succeeds and matter remitted to the First-tier Tribunal

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)**

BETWEEN:

STEVEN JOHN NEWMAN

Appellant

-and-

**(1) JOANNA LUCILLE BIRCH-PHAURE
(2) RUSSELL JOHN TAYLOR**

Respondent

Re: 47 Coolinge Road, Folkestone, CT20 1EW

**Judge Elizabeth Cooke
Decision on written representations**

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Introduction

1. This is Mr Newman's appeal from an order made by the First-tier Tribunal ("the FTT") preventing him from recovering some of his legal costs from his tenants by way of service charge after his successful application to the FTT for a determination of the reasonableness and payability of service charges.
2. The appeal was heard under the Tribunal's written representations procedure. Neither of the respondents has filed a Respondent's Notice but they have made representations by email which make it clear that they wish to participate in the appeal and I have taken into account what they have said.

The factual and legal background

3. The applicant is the freeholder of 47 Coolinge Road, Folkestone, which is a house divided into four flats, each held on long leases. On 5 February 2021 the appellant applied to the FTT for a determination of the reasonableness of service charges for the year ending 24 December 2020 and of the on account charge for 2020/21, pursuant to section 27A of the Landlord and Tenant Act 1985. He also asked for a determination of the sums due to him under demands made of the lessees and of the dates when those payments were due, and of whether he had complied with consultation requirements in respect of qualifying works.
4. Only three of the four lessees participated in the FTT proceedings, the fourth having reached agreement with the appellant.
5. As to the consultation, the FTT noted that none of the respondents suggested that the requirements had not been met, but that there was dissatisfaction about the cost and the choice of contractor (paragraph 31). The FTT went through the consultation process and discussed in some detail the correspondence between the appellant and the lessees about the choice of contractor and the service charge demands. It recorded that Mr Taylor had agreed to pay the service charges demanded in January 2021 "without prejudice to my right to challenge the reasonableness and payability of the charges ... For the avoidance of doubt this payment does not constitute an admission that these monies are due and I fully intend to challenge them" (paragraph 69). The FTT noted that Mr England (one of the three tenants who participated in the FTT proceedings but who is not a respondent to this appeal) had raised concerns about his ability to afford the payments, but said that it could not take that into account in making its decision (paragraph 79). At paragraph 62 it referred to a query by Ms Phaure about an insurance payment, at paragraph 76 to a proposal made by her for payment by instalments, and at paragraph 78 to unspecified "objections" by Ms Phaure arising out of a separate dispute with the appellant, which the FTT said was not relevant to the present proceedings.
6. The FTT determined that the charges for the year ending 2019/20 and the sums demanded on account for 2020/21 were reasonable, and it gave its decision about the due date for payment of the demands in question (paragraphs 81 to 89).
7. Section 20C(1) of the Landlord and Tenant Act 1985 provides:

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before ... the First-tier Tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

8. The FTT recorded that Ms Phaure and Mr Taylor had made applications for such an order, but that the applications were not referred to during the hearing (paragraph 27) and did not give any reasons why the FTT should make the orders (paragraph 94). It determined that the terms of their leases entitle the appellant landlord to recover his costs of the FTT proceedings from them by way of service charge. It observed that since it had found in favour of the landlord there was prima facie no reason to make a section 20C order, but said that there were considerations that made it “just and equitable” to make limited section 20C orders. It made an order that the appellant should be entitled to recover only 25% of the share of his reasonable legal costs that would otherwise have been payable by Ms Phaure and 50% of what would have been payable by Mr Taylor.
9. It gave a number of reasons for so deciding. In respect of both the respondents its reasons were first that the application had been unnecessary; it had emerged at the hearing that the respondents did not dispute their liability to pay (paragraph 106). It also said that the FTT had had to conduct a hearing (by remote video platform), which was necessitated by the length and complexity of the appellant’s written submissions, and that it would be unfair for the two respondents to have to pay for that.
10. In addition, so far as Ms Phaure was concerned, the FTT said that the appellant had singled her out and had failed to make allowance, in correspondence, for her disability which made lengthy documents difficult for her (which it said explained her “offensive language” in communications with the appellant, paragraph 117). It observed that the appellant’s statements were “unnecessarily long and complex”, paragraph 124(b). It expressed the view that Ms Phaure would have agreed to pay the entirety of the sums demanded had the appellant explained things more clearly to her. It expressed concern that the appellant had not made enquiries of the respondents’ financial circumstances during the pandemic and stated that the appellant “appeared to be relying on his previous success in recovering extensive legal costs from her and [has] assumed that he will be able to do so again in connection with this application.”

The grounds of appeal

11. The appellant’s first ground of appeal is that he was not given the opportunity at the hearing to make submissions about the section 20C application. The determination of the applications and the reasons for it were given without warning in the substantive decision and he had had no opportunity to be heard. He also challenges the reasons given by the FTT for making the section 20C orders.
12. Ms Phaure and Mr Taylor have both made representations by email. Both support the reasoning of the FTT. They point out that they said at the hearing that the application had been unnecessary, and that the appellant was aware of the section 20C applications and could have made representations about it.

13. The FTT in refusing permission to appeal said that during the hearing the appellant was able to answer the respondents' suggestions that the application had been unnecessary; furthermore, at the end of the hearing he was asked if there was anything else he wanted to say, and he said there was not.

Decision on the appeal

14. It is not in dispute that the applications for section 20C orders were not referred to during the hearing. I would have expected that in the circumstances once it had made its substantive decision the FTT would have invited the respondents, if they wished to pursue those applications despite the outcome of the hearing, to do so in writing and to explain why the orders should nevertheless be made.
15. Instead the FTT produced its own reasons for making the orders without giving the appellant the opportunity to comment on them. It is unrealistic to suppose that he could have guessed, at the close of the hearing, that the FTT was considering making section 20C orders, and would have anticipated its reasons for so doing and commented on them. The procedure adopted was unfair because it did not give the appellant the opportunity to be heard and for that reason must be set aside.
16. That being the case I do not need to comment in detail on the reasons the FTT gave for its decision. I merely observe that whilst it may have emerged at the hearing that the respondents did not dispute the adequacy of the consultation process or the reasonableness of the charges, that cannot have been apparent to the FTT from the written material submitted to it, and which led it to list a hearing rather than to deal with the matter on the papers. There was clearly a dispute between the parties which necessitated a hearing, an analysis of the consultation process and a substantive decision. So it is not clear to me why the FTT thought that the application was unnecessary, nor why it decided that the respondents should not pay for the additional cost of a hearing. Other points made by the FTT appear to reflect a view of the conduct of the parties without any analysis of the evidential basis for that view – in particular, it is not possible to understand why the FTT thought that the appellant was “relying on his previous success”. And I do not understand why the respondents' financial circumstances, or the appellant's failure to enquire after them, are relevant.

Conclusion

17. The appeal succeeds and the FTT's two orders under section 20C of the Landlord and Tenant Act 1985 are set aside. If either or both the respondents wish to renew their application for an order under section 20C, they are to renew their application to the FTT within 28 days of the date of this decision, giving reasons why the order should be made. If either of them needs to ask for extension to that time limit they are to apply to the FTT.

Upper Tribunal Judge Elizabeth Cooke

11 February 2022

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.